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EXAMINER

SADLON, JOSEPH

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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/590,917	<b>Applicant(s)</b> TREVETHICK, SIMON	
	<b>Examiner</b> JOSEPH J. SADLON	<b>Art Unit</b> 3633	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 20 January 2010.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 41-80 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 41-80 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 20 January 2010 and 25 August 2006 is/are: a) ☐ accepted or b) ☒ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All   b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |   |   |
|---|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)                                | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input checked="" type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date <u>23 Mar. 2010</u> .   | 6) <input type="checkbox"/> Other: _____                          |

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### **DETAILED ACTION**

This communication is a Second Office Action on the Merits. Claims 41-80, as originally filed, are pending and have been considered as follows:

#### ***Information Disclosure Statement***

1. The information disclosure statement (IDS) submitted on 23 Mar. 2010 is/are in compliance with the provisions of 37 CFR 1.97. Accordingly, the information disclosure statement(s) is/are being considered by the examiner.

Note however that the examiner has lined through Cite. No(s). C8, C20-22 and C24-28 in the NonPatent Literature Documents section of the IDS filed 23 Mar. 2010 for either failing to comply with 37 CFR 1.98(b)(5) because no publication date was provided, or for failing to include name of the author (in CAPITAL LETTERS), title of the article (when appropriate), title of the item (book, magazine, journal, serial, symposium, catalog, etc), date, pages(s), volume-issue number(s), publisher, city and/or country where published.

#### ***Drawings***

2. **The drawings were received on 20 Jan. 2010.** These drawings are not acceptable because the drawings appear to show an alternate embodiment inconsistent with the rest of the figures. Note openings 16 have been consistently shown on the opposite side of the batten as the v-grooves 14 and what was identified as the outer surface 13 (see FIGs. 1-4). In the replacement drawings, the openings 16 are clearly located on the inner surface 12.

Corrected drawing sheets in compliance with 37 CFR 1.121(d) are required in reply to the Office action to avoid abandonment of the application. Any amended replacement drawing sheet should include all of the figures appearing on the immediate prior version of the sheet, even if only one figure is being amended. Each drawing sheet submitted after the filing date of

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an application must be labeled in the top margin as either “Replacement Sheet” or “New Sheet” pursuant to 37 CFR 1.121(d). If the changes are not accepted by the examiner, the applicant will be notified and informed of any required corrective action in the next Office action. The objection to the drawings will not be held in abeyance.

**3. The drawings are objected to under 37 CFR 1.83(a).** The drawings must show every feature of the invention specified in the claims. Therefore, the following must be shown or the feature(s) canceled from the claim(s):

- “transverse channel...outer surface of the batten” (claim 49; a transverse channel on the outer surface of the batten for face to face engagement with the overlying cladding sheet has not been shown; note, it is not clear what Applicant is considering the “outer surface of the batten”)
- “batten and cladding subassembly” (claim 78; a subassembly of battens and cladding has not been shown; note claim 78 recites “attaching the battens...cladding sheets” which requires a plurality of battens and a plurality of cladding sheets which has not been shown, thus it is unclear what Applicant is considering a “subassembly”)

No new matter should be entered.

Corrected drawing sheets in compliance with 37 CFR 1.121(d) are required in reply to the Office action to avoid abandonment of the application. Any amended replacement drawing sheet should include all of the figures appearing on the immediate prior version of the sheet, even if only one figure is being amended. The figure or figure number of an amended drawing should not be labeled as “amended.” If a drawing figure is to be canceled, the appropriate figure must be removed from the replacement sheet, and where necessary, the remaining figures must

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be renumbered and appropriate changes made to the brief description of the several views of the drawings for consistency. Additional replacement sheets may be necessary to show the renumbering of the remaining figures. Each drawing sheet submitted after the filing date of an application must be labeled in the top margin as either "Replacement Sheet" or "New Sheet" pursuant to 37 CFR 1.121(d). If the changes are not accepted by the examiner, the applicant will be notified and informed of any required corrective action in the next Office action. The objection to the drawings will not be held in abeyance.

**4. The drawings are objected to by the draftsperson under 37 CFR 1.84 or 1.152.** See attached Form PTO-948. Corrected drawing sheets in compliance with 37 CFR 1.121(d) are required in reply to the Office action to avoid abandonment of the application. Any amended replacement drawing sheet should include all of the figures appearing on the immediate prior version of the sheet, even if only one figure is being amended. The figure or figure number of an amended drawing should not be labeled as "amended." If a drawing figure is to be canceled, the appropriate figure must be removed from the replacement sheet, and where necessary, the remaining figures must be renumbered and appropriate changes made to the brief description of the several views of the drawings for consistency. Additional replacement sheets may be necessary to show the renumbering of the remaining figures. Each drawing sheet submitted after the filing date of an application must be labeled in the top margin as either "Replacement Sheet" or "New Sheet" pursuant to 37 CFR 1.121(d). If the changes are not accepted by the examiner, the applicant will be notified and informed of any required corrective action in the next Office action. The objection to the drawings will not be held in abeyance.

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***Claim Objections***

**5. Claim 70 is objected to because of the following informalities:**

- line 1, “the outer surface” appears to lack proper antecedent basis;
- line 2, “the inner surface” appears to lack proper antecedent basis;

Appropriate correction is required.

***Specification***

**6. The specification is objected to as failing to provide proper antecedent basis for the claimed subject matter. See 37 CFR 1.75(d)(1) and MPEP § 608.01(o). Correction of the following is required:**

- in claim 70, line 2, the recitation “past the batten” fails to find proper antecedent basis from within the specification, as the phrase appears to suggest the batten has an effect on the moisture beyond the end of the batten.

Appropriate correction is required.

***Claim Rejections - 35 USC § 112***

**7. The following is a quotation of the second paragraph of 35 U.S.C. 112:**

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

**8. Claim(s) 70 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.**

As per claim 70, line 2, the recitation “the outer surface is grooved, to facilitate the downward passage past the batten of water passing along the inner surface of the outer cladding material” is vague, indefinite and confusing as not being clear. It is unclear what is meant by the

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phrase “passage past the batten of water passing” because it is not clearly pointed out what is encompassed by “past the batten”. As noted in the objections to the claims above (see **5.**), the outer surface and the inner surface each lack proper antecedent basis. To overcome the antecedent basis objection as well as the 112 rejection, it is suggested to introduce the limitations --wherein the elongate batten comprises an outer surface; wherein the outer wall cladding sheet comprises an inner surface; and wherein the outer surface is grooved to facilitate passage of water along the inner surface of the outer wall cladding sheet--.

***Claim Rejections - 35 USC § 102***

**9.** The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

**10. Claims 41-58 are rejected under 35 U.S.C. 102(b) as being anticipated by Zambelli et al. (U.S. 6,729,093).**

**As per claim 41**, Zambelli et al. teaches an elongate batten (via sheet 2, FIG. 2) adapted for positioning intermediate an inner wall framing member (via sheet 3, FIG. 2) and an outer wall cladding sheet (via body 13, FIG. 2) to facilitate dispersion and evaporation of moisture from a wall cavity, said batten including at least one longitudinally extending channel (via chamber 4, FIG. 2) to facilitate migration and drainage of moisture between the batten and the framing member along the length of the batten.

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**As per claim 42**, Zambelli et al. teaches the at least one longitudinal channel (via recess 5, FIG. 1) is formed in an inner surface of the batten adapted for face-to-face engagement with an adjacent outer surface of the underlying framing member (see “toward” col. 2, ln. 65-68).

**As per claim 43**, Zambelli et al. teaches the at least one longitudinal channel (9) is formed in an outer surface of the batten (see FIG. 2; note grooves 9 are recognized as being on an outer surface) adapted for face-to-face engagement with an adjacent inner surface of the overlying cladding sheet (see FIG. 2; note at the upper portion of this figure groove 9 is recognized as “face-to-face” with the inner surface of body 13).

**As per claim 44**, Zambelli et al. teaches the at least one longitudinal channel extends through the batten (see FIG. 2; note chamber 4 is recognized as extending “through” panel 1 i.e. between sidewalls, cups, and second sheet).

**As per claim 45**, Zambelli et al. teaches a plurality of said longitudinal channels disposed in generally parallel side-by-side relationship (see FIG. 2; note chambers 4 are recognized as having parallel, side by side relationship) and extending along substantially the entire length of the batten.

**As per claim 46**, Zambelli et al. teaches the longitudinal channels are respectively formed between adjacent pairs of a corresponding plurality of longitudinal ridges (via cups 2a), said ridges collectively defining the inner surface of the batten (see FIG. 2; see also “delimit, between them” col. 2, ln. 59).

**As per claim 47**, Zambelli et al. teaches the batten includes a generally transverse channel (via passage 6, FIG. 5) to facilitate migration and drainage of moisture across the batten.



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**As per claim 48**, Zambelli et al. teaches said transverse channel is formed in the inner surface (via passage 6, FIG. 5) of the batten adapted for face-to-face engagement with the adjacent outer surface of the framing member (via face of sheet 3, FIG. 2).

**As per claim 49**, Zambelli et al. teaches the transverse channel is formed in an outer surface of the batten (via groove 9, FIG. 3; note grooves 9 are recognized as extending longitudinally and transversely) adapted for face-to-face engagement with an adjacent inner surface of the overlying cladding sheet (via concrete body 13, FIG. 2).

**As per claim 50**, Zambelli et al. teaches the transverse channel extends through the batten (see FIG. 4; note groove 9 and passage 4 extend transversely through first sheet 2).

**As per claim 51**, Zambelli et al. teaches a plurality of said longitudinal channels (via recesses 5, FIG. 1) disposed in generally parallel side-by-side relationship and extending along substantially the entire length of the batten,

the longitudinal channels being respectively formed between adjacent pairs of a corresponding plurality of longitudinal ridges (via cups 2a, FIG. 1), said ridges collectively defining the inner surface of the batten (see FIG. 1; note recesses along inner surface are defined by cups 2a), and

a plurality of said transverse channels (via passages 6 and grooves 9, FIG. 4) to facilitate migration and drainage of moisture across the batten, said transverse channels being disposed in generally parallel side-by-side relationship (see FIG. 4; note passages 6 and grooves 9 are recognized as being disposed in generally parallel side-by-side relationship).

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**As per claim 52**, Zambelli et al. teaches the transverse channels are defined by a corresponding series of openings (via passages 6, Fig. 6) formed in the respective longitudinal ridges.

**As per claim 53**, Zambelli et al. teaches the openings defining the respective transverse channels are transversely aligned (via passages 6, FIG. 4).

**As per claim 54**, Zambelli et al. teaches the openings defining the respective transverse channels are transversely staggered (via passages FIG. 4; note passages 6 are considered staggered across width of recess 5).

**As per claim 55**, Zambelli et al. teaches the transverse and longitudinal channels form a ventilation and drainage matrix (via “mutually connected recesses 5” col. 4, ln. 40-44) adapted to permit migration of moisture in liquid or vapour form across, along and through the batten.

**As per claim 56**, Zambelli et al. teaches the longitudinal and transverse channels are disposed in generally orthogonal relationship (see FIG. 3; note grooves 9 are recognized as intersecting in a generally orthogonal relationship).

**As per claim 57**, Zambelli et al. teaches at least some of the transverse and longitudinal channels respectively intersect (see FIG. 3; note grooves 9 are recognized as intersecting in a generally orthogonal relationship).

**As per claim 58**, Zambelli et al. teaches being formed from a plastics material adapted to resist moisture permeation (see “solved the problem” col. 1, ln. 65-67), and adapted to be readily cut to desired lengths using conventional sawing tools (via “molded polystyrene” claim 14; note molded polystyrene is recognized as a material that is readily cut by hand using conventional tools).

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**As per claim 70**, Zambelli et al. teaches the outer surface is grooved (see FIG. 2; note rectangular openings disposed between cups 2a which open towards sheet 3; these are recognized as “grooves” through the “outer surface” as broadly claimed), to facilitate the downward passage past the batten of water passing along the inner surface of the outer cladding material.

**11. Claims 71, 72, 74, 75, 76, and 79 and 80 are rejected under 35 U.S.C. 102(b) as being anticipated by Clayton (U.S. 2002/0108333).**

**As per claim 71**, Clayton teaches a method of building construction (via “inexpensive system and method”, [0002] lines 1-4), said method comprising the steps of (via “construction”, claim 7):

forming a structural frame from framing members (via “wooden structural members”, cl. 7, ln. 4; see also stud 1, FIG. 6),

such that the framing members define cavities therebetween (see wooden stud 1, Fig. 6; note that although only a single stud is shown, it is construed that a plurality of studs would be arranged to comprise an exterior surface of cl. 6);

securing a plurality of battens (via hydrophobic layer 20, FIG. 6) to outer surfaces (via outer face 3, FIG. 6) of at least some of the framing members (via at least one shown, FIG. 6),

wherein each of said plurality of battens include at least one longitudinally extending channel (via notches 62, FIG. 7; note also notches shown on hydrophobic layer 20, facing wooden stud 1, FIG. 6) to facilitate migration and drainage of moisture (via “water” and “downward” [0014] ln. 10-13) between the batten and the framing member along the length of the batten,

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applying an outer cladding material (via stucco layer 10, FIG. 6) to substantially cover the framing members and the battens (see “overlain” [0012] ln. 5-7);

such that the battens collectively form a clearance space (see FIG. 6; note clearance formed between stud 1 and stucco layer 10) between the framing members and the cladding material;

the battens thereby facilitating drainage (via “flow downward” [0014] ln. 10-13) and ventilation (see “communicating between” [0014] ln. 7-8) of the cavities.

**As per claim 72**, Clayton teaches the structural frame is formed substantially from a material selected from the group comprising timber (via wooden stud 1, FIG. 6), metal, FRC and plastics, and wherein the method is employed to construct a wall section (via “wall construction” [0002] ln. 1-3) of a building.

**As per claim 74**, Clayton teaches the battens are secured so as collectively to cover more than approximately 50% (see FIG. 6; note it is recognized that hydrophobic layer 20 is shown covering “more than approximately 50%” of outer surface 3 of wooden stud 1) of the combined outer surface area of the framing members to which the method is applied.

**As per claim 75**, Clayton teaches the battens are secured to the framing members by a fastening technique selected from the group comprising nailing (via fastening means 7, FIG. 6; see also “nails” claim 8, ln. 3), screwing, tacking, stapling, gluing, welding, chemical bonding, frictional engagement, and mechanical engagement.

**As per claim 76**, Clayton teaches the further step of applying an internal lining material (via gypsum wallboard 4, FIG. 6) such that the framing members are effectively sandwiched, directly or indirectly, between the external cladding material and the internal lining material (see

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FIG. 6; note it is recognized that wooden stud 1 is considered “effectively sandwiched” as claimed).

**As per claim 79**, Clayton teaches including the step of forming the at least one longitudinal channel or a generally transverse channel in the batten by a process selected from the group comprising: extruding; machining; milling; routing; casting; moulding; and fabricating (via “formed” [0018] ln. 8); or a combination of those.

**As per claim 80**, Clayton teaches a building or building section constructed by the method comprising:

forming a structural frame (via “load bearing members” [0013] ln. 3-6; see also stud 1, FIG. 6) from framing members, such that the framing members define cavities therebetween (see wooden stud 1, Fig. 6; note that although only a single stud is shown, it is construed that a plurality of studs would be arranged to comprise an exterior surface of cl. 6);

securing a plurality of battens (via hydrophobic layer 20, FIG. 6) to outer surfaces of at least some of the framing members (via outer surface 3, FIG. 6),

wherein each of said plurality of battens include at least one longitudinally extending channel (via notch 62, FIG. 7; see also FIG. 6) to facilitate migration and drainage of moisture (via “flow downward” [0014] ln. 10-13) between the batten and the framing member along the length of the batten,

applying an outer cladding material (via stucco 10, FIG. 6) to substantially cover the framing members and the battens (see FIG. 6; note it is recognized that stucco layer 10 is shown to “substantially cover” wooden stud 1 and hydrophobic layer 20);

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such that the battens collectively form a clearance space between the framing members and the cladding material (see FIG. 6; note it is recognized that a clearance space is formed between stud 1 and stucco layer 10).

***Claim Rejections - 35 USC § 103***

**12.** The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

**13.** The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

**14. Claim 59 is rejected under 35 U.S.C. 103(a) as being unpatentable over Zambelli et al. in view of Shaw (U.S. 4,837,991).**

**As per claim 59**, Zambelli et al. teaches the limitations of claim 41, but fails to explicitly disclose incorporating pre-formed lines of weakness disposed at predetermined intervals, to permit the batten to be manually divided into small sections of desired length, without the need for cutting or sawing.

Shaw '991 teaches a channel means (title) wherein a polymer extrusion is used in construction to provide a means for absorption and the drain away of moisture (col. 2, ln. 46) in which, during extrusion, preformed lines of weakness can be included to allow a portion of the channel to later be manually divided into small sections of desired length, without the need for cutting or sawing.

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From this teaching of Shaw '991, it would have been obvious to one of ordinary skill in the art of water mitigation to include the longitudinally or horizontally disposed weakened lines for the purpose of allowing the sheet to be manually divided into small sections of desired length, without the need for cutting or sawing.

**15. Claim 60 is rejected under 35 U.S.C. 103(a) as being unpatentable over Zambelli et al. in view of Shaw (U.S. 6,108,992).**

**As per claim 60**, Zambelli et al. teaches the limitations of claim 41 but fails to explicitly disclose a batten being formed substantially from PVC.

Shaw '992 teaches a rot protector (title) designed to prevent moisture accumulation (via "prevents" col. 5, ln. 48) and promote runoff (via "drip off" col. 6, ln. 24) constructed of resilient thermoplastic material (via "resilient" col. 8, ln. 11).

Since PVC is a widely used thermoplastic material, from this teaching of Shaw '992, it would have been an obvious choice to one of ordinary skill in the art to construct the sheet of Zambelli et al. using PVC for the purpose of providing a surface that will prevent water accumulation and promote runoff.

**16. Claim 61 rejected under 35 U.S.C. 103(a) as being unpatentable over Zambelli et al. in view of Black et al. (U.S. 2003/005412).**

**As per claim 61**, Zambelli et al. teaches the limitations of claim 41, but fails to explicitly disclose being formed substantially from FRC.

Black et al. teaches a reinforced fiber cement article (title), wherein it is disclosed that fiber cement ("FC") materials have preferred qualities of non-combustibility, strength, and durability (see [0111], ln. 1-4).

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From this teaching of Black, et al. it would have been obvious to one of ordinary skill in the art at the time the invention of Zambelli et al. was made to use fiber cement in constructing the panel for the purpose of providing a non-combustible, strong, and durable article.

**17. Claims 62-69 rejected under 35 U.S.C. 103(a) as being unpatentable over Zambelli et al. alone.**

As per claims 62-65, Zambelli et al. teaches the limitations of claim 41, but fails to explicitly disclose:

- the batten being between 30 and around 60 mm in width
- being approximately 45 mm in width
- between 10 mm and around 30 mm in thickness
- being approximately 19 mm in thickness

It is well settled that changes in size/proportion do not constitute a patentable difference. See *In Gardner v. TEC Systems, Inc.*, 725 F.2d 1338, 220 USPQ 777 (Fed. Cir. 1984), cert. denied, 469 U.S. 830, 225 USPQ 232 (1984), wherein the Federal Circuit held that, where the only difference between the prior art and the claims was a recitation of relative dimensions of the claimed device and a device having the claimed relative dimensions would not perform differently than the prior art device, the claimed device was not patentably distinct from the prior art device. See also, *Hobbs v. Wisconsin Power and Light Company et al.*, 115 USPQ 371 (CA 1957), in which the court stated that “[g]enerally, it is not invention to change size or degree of thing or of any feature or function of machine or manufacture; there is no invention where change does not involve different concept, purposes, or objects, but amounts to doing same thing substantially the same way with better results.” See also, *The Ward Machinery Company v.*



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Wm. C. Staley Machinery Corporation, in which the court stated that “[i]mprovement resulting from change in size, proportion, or degree of element contained in prior art, no matter how desirable or useful, does not constitute patentable invention.”

It would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the invention of Zambelli et al. by making the panel of appropriate dimensions in order to produce an optimal structure and because changes in size/proportion do not constitute a patentable difference.

**As per claim 66**, Zambelli et al. teaches three longitudinal channels (see FIG. 2), but fails to explicitly disclose:

- each being approximately 9.5 mm in width and approximately 17 mm in height
- defined by respective intermediate ridges being approximately 2.5 mm in thickness.

(See rejections of claim 62-65 above)

It would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the invention of Zambelli et al. by making the panel to appropriate dimensions for the structure to be protected and because changes in size/proportion do not constitute a patentable difference.

**As per claim 67**, Zambelli et al. teaches the limitations of claim 66, and further discloses the transverse channels are defined by a series of cutouts in the ridges (via passage 6, FIG. 6), each cutout being generally U-shaped (see FIG. 6; note channels 6 are recognized as having a generally U-shaped profile) but fails to explicitly disclose:

- the cutouts having a length of around 20 mm and a height of around 8 mm,

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- the cutouts being spaced apart along the respective ridges with approximately 50 mm between centers.

(See rejections of claims 62-65 above)

It would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the invention of Zambelli et al. by making the panel to appropriate dimensions for the structure to be protected and because changes in size/proportion do not constitute a patentable difference.

**As per claim 68**, Zambelli et al. teaches corresponding cutouts on adjacent ridges are staggered (via passages 6, FIG. 4; note passages 6 are considered staggered, as broadly claimed, occurring at intervals across width of recess 5).

**As per claim 69**, Zambelli et al. teaches the limitations of claim 41, and further discloses the batten being adapted for division into smaller predetermined lengths on-site (via foamed polystyrene, which is known to manipulated by conventional tools) but fails to explicitly disclose:

- the batten having any preformed length of around 2400mm.

(See rejections of claims 62-65 above)

It would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the invention of Zambelli et al. by making the panel to appropriate dimensions for the structure to be protected and because changes in size/proportion do not constitute a patentable difference.

**18. Claim 73 is rejected under 35 U.S.C. 103(a) as being unpatentable over Zambelli et al. in view of Clear et al. (U.S. 6,119,422).**

**As per claim 73**, Clayton teaches the method according to claim 71, but fails to explicitly disclose the cladding material is FRC sheet.

Clear et al. teaches a composite building panel (via Abstract, ln. 1-2), wherein the panel includes a reinforced cementitious panel to provide an improved insulated panel with more resistance to damage.

From this teaching of Clear et al., it would have been obvious to one of ordinary skill in the art at the time the invention of was made to modify the invention of Clayton by substituting the stucco layer with the reinforced cementitious panel of Clear et al. for the purpose of providing an improved insulated panel with more resistance to damage.

**19. Claim 77 is rejected under 35 U.S.C. 103(a) as being unpatentable over Zambelli et al. in view of Flotow et al. (U.S. 3,859,766).**

**As per claim 77**, Clayton teaches the method according to claim 76, but fails to explicitly disclose the internal lining material is plasterboard.

Flotow et al. teaches a wall structure for mobile homes (title), wherein a wall structure comprises an internal lining material of plasterboard (via plasterboard sheets 14, FIG. 1).

From this teaching of Flotow et al., it is apparent that it would have been an obvious engineering choice to one of ordinary skill in the art to modify the invention of Clayton by constructing the drainage apparatus using the plasterboard sheets of Flotow et al. attached to the inner face of the wooden stud.

**20. Claim 78 is rejected under 35 U.S.C. 103(a) as being unpatentable over Zambelli et al. in view of Cox (U.S. 7,096,629).**

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**As per claim 78**, Clayton teaches the method according to claim 71, but fails to explicitly disclose the step of pre-attaching the battens to the cladding sheets to form a batten and cladding sub-assembly, and subsequently securing the sub-assembly to the frame.

Cox teaches an exterior wall cladding system (title) specifically designed for thin reinforced panels (via Abstract, ln. 1-2), which are structurally supported in such a manner to sufficiently resist various bending forces (col. 6, ln. 35-48), wherein:

cladding (exterior wall cladding, title) is provided by pre-attaching the battens (via frame 100, FIG. 38) to the cladding sheets (via thin stone panel 101, FIG. 38) to form a batten and cladding sub-assembly, and subsequently securing (via “attached” col.8 ln. 30-33; note interlocking connection taught by Cox is considered analogous to nailing as means for securing) the sub-assembly to the frame (via substrate 138b, FIG. 38; see also “steel stud framing” col. 6, ln. 60).

From this teaching of Cox, it would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the method taught by Clayton by pre-attaching the battens to the cladding sheets using the method of Cox to form a batten and cladding sub-assembly, and subsequently securing the sub-assembly to the frame, for the purpose of providing strength and stiffness, as well as allowing pre-assembly in a shop thereby lowering the cost of production.

### ***Response to Arguments***

**21.** Applicant's arguments filed 20 Jan. 2010 have been fully considered but they are not persuasive.

As per the argument directed to Zambelli et al. (US 6,729,093), that “adjacent sheet 3 does not provide an “inner wall framing member” and the surrounding concrete body 13 does not provide an “outer wall cladding sheet””(page 4), the Examiner submits that the sheet 3 can be used as in inner wall framing member; also, concrete body 13, which is positioned above sheet 2 in FIG. 1 serves as an outer wall cladding sheet as broadly claimed.

Also, the claims are replete with statements that are either essentially method limitations or statements of intended or desired use. For example, “to facilitate dispersion and evaporation of moisture from a wall cavity”, or “facilitate migration and drainage of moisture”, etc. These clauses, as well as other statements of intended use do not serve to patently distinguish the claimed structure over that of the reference, as long as the structure of the cited references is capable of performing the intended use. See MPEP 2111-2115.

See also MPEP 2114 that states:

A claim containing a “recitation with respect to the manner in which a claimed apparatus is intended to be employed does not differentiate the claimed apparatus from a prior art apparatus” if the prior art apparatus teaches all the structural limitations of the claim. *Ex parte* Masham, 2 USPQ2d 1647.

The Examiner points out that with the limitation “adapted for positioning intermediate an inner wall framing member and an outer wall cladding sheet”, both “an inner wall framing member” and “an outer wall cladding sheet” are only functionally recited. It is suggested to introduce the batten in a building, or in a wall structure as --a wall structure comprising at least one batten positioned intermediate an inner wall framing member and an outer wall cladding sheet--.

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Further, it has been held that the recitation that an element is “adapted to” perform a function is not a positive limitation but only requires the ability to so perform. It does not constitute a limitation in any patentable sense. *In re Hutchison*, 69 USPQ 138.

As per the argument that “Zambelli does not disclose or suggest the feature of a wall cavity as recited in Applicant's independent claim 41”, the Examiner submits that Zambelli et al. clearly discloses “a cavity” as broadly claimed, which exists between the frame profiles (see “a frame...composed of at least two longitudinal profiles 17 and 18”, page 4, ln. 1-7). The intended use of facilitating dispersion does not distinguish Applicant's batten over the prior art sheet of Zambelli et al. (see sheet 2 of Zambelli et al.; note also that sheet 2 of Zambelli et al. would facilitate dispersion because concrete is known to be porous).

As per the argument directed towards Zambelli et al. that “there is no disclosure of moisture drainage” (page 5), the Examiner submits that the functional recitation of “to facilitate dispersion and evaporation” has not been given patentable weight because it is narrative in form. In order to be given patentable weight, a functional recitation must be expressed as a “means” for performing the specified function, as set forth in 35 USC § 112 6<sup>th</sup> paragraph, and must be supported by recitation in the claim of sufficient structure to warrant the presence of the functional language. *In re Fuller*, 1929 C.D. 172,388 O.G. 279.

As per the general argument “Applicant does not consider the passages 6 of Zambelli to provide the feature of a ‘generally transverse channel to facilitate the migration and drainage of moisture across the batten’”, the Examiner submits that it is not Applicant's consideration that fails to define the claimed device over the prior art of Zambelli et al., but rather the claimed structure, which has been shown as anticipated by Zambelli et al.

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As per the arguments “[w]ith regards to claims 43 and 45” (page 5), the Examiner submits that the claimed “longitudinal channel is formed in the outer surface” and also the longitudinal channels when recited as “a plurality” are both clearly taught by Zambelli et al. in FIG. 2. Sheet 2 of Zambelli et al. would “facilitate migration and dispersion” because concrete is known to be porous.

As per the argument that “there is no cavity construction in Clayton of the type defined in Applicant’s claims” (page 6), the Examiner submits that Clayton (US 2002/0108333) clearly defines cavities, as broadly claimed, between the studs 1.

As per the arguments with regards to “Zambelli as principal reference”, as combined with Black et al. (US 2003/0054123), the “use of fibre cement has not been obvious as in non-severe climate applications and in fact, the use of fibre cement battens would be seen as over engineering”, the Examiner submits that the [r]eferences are evaluated by what they suggest to one versed in the art, rather than by their specific disclosures. *In re Bozek*, 163 USPQ 545 (CCPA 1969). In this case, Black et al. teaches fiber cement used as reinforcement, and it would been obvious for Zambelli to use fiber cement as taught by Black for the purpose of increased strength and durability. The fact that the material of Black et al. as claimed is over engineering or would require an increased cost is irrelevant.

As per the argument directed to Cox (US 7,096,629) “the panels of Cox are mounted to a complex interlocking support system” (page 8), the Examiner submits that Cox was/is not relied upon to teach any relation to “condensation” that wasn’t already addressed, rather Cox provided the teaching and the motivation for providing a sub assembly.

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**22.** Applicant's arguments with respect to claim 70 have been considered but are moot in view of the new ground(s) of rejection.

***Conclusion***

**23.** Any inquiry concerning this communication or earlier communications from the examiner should be directed to JOSEPH J. SADLON whose telephone number is (571)270-5730. The examiner can normally be reached on M-F 7:30A-5:00P/Alt. Fri. Off. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, David Dunn can be reached on (571)272-6670. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/DAVID DUNN/  
Supervisory Patent Examiner, Art Unit 3636

/J. J. S./  
Examiner, Art Unit 3633

/JS/